Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Applications of AT&T	)	
Corporation and Tele-Communications,	)	CS Docket No. 98-178
Inc. for Transfer of Control of	)	
Various FCC Licenses to AT&T	)	

REPLY COMMENTS OF CORECOMM LIMITED

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SUMMARY

CoreComm is a new, publicly traded communications company that currently provides, through various direct and indirect wholly-owned subsidiaries, a variety of competitive telecommunications products and services in several states, including competitive local exchange, landline long distance resale, prepaid and long distance cellular, Centrex and paging services. CoreComm is also the "A Block" LMDS licensee for 15 BTA markets. Through a wholly-owned subsidiary, CoreComm is the only competitive local exchange carrier ("CLEC") in the State of Ohio that is currently providing local exchange service to residential customers. The company's ultimate business objective is to expand its present offerings to include multi-channel video and high speed Internet services that afford its customers the ability to assemble a suite of communications services that are specifically tailored to meet the customer's individual needs.

As a prospective competitor in the market for integrated voice, video and data services CoreComm has a real and substantial interest in addressing the significant competitive threats posed by the proposed merger between AT&T Corporation ("AT&T") and Tele-Communications Inc. ("TCI"). CoreComm is able to offer a unique and valuable perspective on these threats by virtue of its relationship with NTL, Inc. ("NTL"), a domestic corporation and one of the leading communications companies in the United Kingdom. Specifically, many of the executive officers and directors of CoreComm are also officers and directors of NTL, which is currently the third largest operator of local broadband communications systems in the UK. NTL is the only provider of broadband services in its franchise areas, including residential

telephony, cable television and Internet access services to customers connected to its networks. As a result, CoreComm is able to speak with authority on the competitive implications of the proposed merger and its likely adverse impact on the introduction and development of competition.

Unlike the merged AT&T/TCI entity, CoreComm will not enjoy the vast resources, installed customer base, control over essential facilities, market power or brand recognition created by combining the nation's largest long-distance carrier with one of the most powerful vertically-integrated cable MSOs in the marketplace today. Indeed, even as separate entities, AT&T and TCI already enjoy formidable competitive advantages in each of the areas described above. The concentration of each entity's enormous market power, particularly when viewed in the context of cable's historical hostility to competition and certain suggestions of potential anticompetitive conduct from the AT&T/TCI license transfer applications themselves, raises serious questions as to whether the proposed merger will undermine the Commission's agenda for promoting near-term entry by new broadband service providers.

CoreComm is particularly concerned that the merger will provide TCI and its cable programming subsidiary, Liberty Media Corp. ("Liberty"), with additional opportunities to evade the Commission's program access rules. Chairman Kennard has acknowledged that "[n]ew entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and effectively." As already pointed out by other parties in this proceeding, however, AT&T/TCI's emphasis on the alleged post-merger "separation" of Liberty from TCI's cable systems via the

use of "tracking stock" subsidiaries appears to be a stalking horse for a future argument that the post-merger Liberty will not be "vertically integrated," and thus will fall completely outside the scope of the program access rules. As discussed herein, such an argument would be incorrect, since it is well settled that the use of "tracking stock" will not have any bearing on AT&T's underlying control of Liberty or TCI's cable systems. The Commission thus should reaffirm that principle here to preclude AT&T/TCI from using the "tracking stock" argument as a basis for withholding programming from TCI's competitors.

Moreover, the proposed integration of AT&T's nationwide fiber-optic network with TCI's regional cable systems (and potentially those of other cable MSOs) will provide Liberty with the ability and incentive to migrate its programming from satellite to terrestrial delivery, and thereafter argue that such programming does not have to be sold to the merged entity's competitors. The mere threat of such behavior would disserve the Commission's touchstone objective of promoting competition between all providers of multichannel video programming service ("MVPDs"), and thus it is imperative that the Commission take preemptive action in *this* proceeding to ensure that it does not occur.

Furthermore, price discrimination continues to be a serious problem for CoreComm and other alternative MVPDs, in large part due to the unavailability of volume discounts and other favorable terms and conditions which Liberty and other vertically-integrated programmers extend exclusively to TCI and other cable MSOs. For this reason, a thorough Commission inquiry into the terms and conditions of Liberty's "preferred vendor" agreements with TCI's cable systems, similar to that which the Commission conducted in connection with its review of

Fox's proposed investment in the cable-controlled Primestar DBS service, is necessary to ensure that the merger does not worsen the already unfavorable program access environment for TCI's competitors if and when the proposed merger is consummated.

AT&T/TCI also have made it abundantly clear that TCI's @Home service will be the "portal" through which TCI's subscribers must travel in order to obtain access to Internet service providers ("ISPs") unaffiliated with AT&T or TCI. Furthermore, TCI has indicated that it will require its subscribers to "buy-through" @Home if they wish to purchase service from an unaffiliated ISP, meaning that TCI's subscribers must pay for *two* ISPs even where they only wish to subscribe to one. There is little question that TCI's Internet strategy is intended to discourage TCI's subscribers from taking service from unaffiliated ISPs and thus establish @Home as the exclusive ISP for millions of customers throughout the United States. The same anticompetitive result obtains where the incumbent cable provider (in this case TCI) leverages its market power and control over essential facilities to force its customers to purchase Internet access or other "tied" services (*e.g.*, local telephony), or uses its monopoly rents from deregulated cable services to offer other broadband services at predatory prices.

Accordingly, to ensure that the benefits of full and fair competition are preserved for all consumers in the wake of the proposed AT&T/TCI merger, CoreComm respectfully requests that the Commission deny the AT&T/TCI license transfer applications, or, alternatively:

- Affirm that Liberty will remain subject to the Commission's program access rules if and when the proposed merger is consummated;
- Secure an explicit and enforceable commitment from AT&T/TCI that any Liberty programming migrated from satellite to terrestrial delivery will

continue to be available to alternative MVPDs on nondiscriminatory terms and conditions;

- Require AT&T/TCI to provide the Commission (subject to an appropriate protective order) with full details of the nature, terms and conditions of Liberty's "preferred vendor" arrangements with TCI's cable systems (including any written or oral agreements, side letters or understandings related thereto), and to provide all relevant documentation of such arrangements for Commission review and comment by interested parties;

- Secure an explicit and enforceable commitment from AT&T/TCI that they will provide unaffiliated ISPs with open, nondiscriminatory access to the AT&T/TCI broadband network; and

- Secure an explicit and enforceable commitment from AT&T/TCI that they will not require any TCI subscriber to purchase AT&T's telephony or Internet access services as a precondition for purchase of TCI's multichannel video service, and that they will not use TCI's unregulated cable revenues to subsidize the merged entity's telephony or Internet access services.

Finally, to ensure that AT&T/TCI's commitments are enforced, CoreComm further requests that the Commission declare that those commitments will be deemed conditions precedent to the Commission's approval of the AT&T/TCI license transfer applications; impose periodic reporting requirements on the merged entity so that compliance with its commitments may be verified; and provide for appropriate sanctions where it is determined that AT&T/TCI's commitments have not been satisfied.

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REPLY COMMENTS OF CORECOMM LIMITED

CoreComm Limited ("CoreComm"), by its attorneys, hereby submits its Reply Comments in opposition to the various license transfer applications submitted in connection with the proposed merger between AT&T Corporation ("AT&T") and Tele-Communications, Inc. ("TCI") (AT&T and TCI hereinafter referred to as the "Joint Applicants").[1/]

I. THERE IS A SUBSTANTIAL RISK THAT APPROVAL OF THE AT&T/TCI MERGER WILL STIFLE THE INTRODUCTION AND DEVELOPMENT OF COMPETITION IN THE NEWLY EMERGING MARKET FOR DIVERSIFIED COMMUNICATIONS SERVICES.

CoreComm is a new, publicly traded communications company that currently provides, through various direct and indirect wholly owned subsidiaries, a variety of competitive telecommunications products and services in several states, including competitive local exchange, landline long distance resale, prepaid and long distance cellular, Centrex and paging

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[1/] *See* "AT&T Corporation and Tele-Communications, Inc. Seek FCC Consent For A Proposed Transfer of Control," FCC Public Notice, DA 98-1969 (rel. Sept. 29, 1998).

services.[2/] Through a wholly owned subsidiary, CoreComm is the only competitive local exchange carrier ("CLEC") in the State of Ohio that is currently providing local exchange service to residential customers. The company's ultimate business objective is to expand its present offerings to include multi-channel video and high speed Internet services that afford its customers the ability to assemble a suite of communications services that are specifically tailored to meet each customer's individual needs.

As a prospective competitor in the market for integrated voice, video and data services CoreComm has a real and substantial interest in addressing the significant competitive threats posed by the proposed merger under consideration in this proceeding. CoreComm is able to offer a unique and valuable perspective on these threats by virtue of its relationship with NTL, Inc. ("NTL"), which is currently the third largest operator of local broadband communications systems in the United Kingdom.[3/] NTL is the only provider of broadband services in its franchise areas, offering residential telephony, cable television and Internet access services to customers connected to its networks. As a result, CoreComm is able to speak with authority on the competitive implications of the proposed merger and its likely adverse impact on the introduction and development of competition.

Clearly, the stakes in this matter are high. The escalating demand for high-speed data connectivity in the consumer and business markets, combined with the rapid transformation of the Internet into a non-textual, bandwidth-hungry medium of communication, leaves little doubt

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[2/] CoreComm is also the "A Block" LMDS licensee for 15 BTA markets.

[3/] Specifically, many of the executive officers and directors of CoreComm are also officers and directors of NTL.

that CoreComm and other broadband providers will be an essential resource in the Commission's effort to achieve widespread advanced telecommunications capability in a timely manner.[4/] As was recognized last year in the Office of Plans and Policy Working Paper, *Digital Tornado: The Internet and Telecommunications Policy* ("*Digital Tornado*"):

> The Internet is only useful to people if they are able to access it, and the value of the Internet is, to an increasing extent, dependent on the level of bandwidth available to end users. Thus, issues of service availability and affordability, especially with regard to services that provide higher bandwidth than analog POTS lines, will be central to the development of the Internet as a mass-market phenomenon that benefits all Americans.[5/]

By the same token, however, customers cannot enjoy the benefits of competition if competitors are unable to bridge the "last mile" to the subscriber, a problem which to date has slowed the deployment of advanced services throughout the United States.[6/] In this regard,

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[4/] *See, e.g.*, Price, "The Business World's Hunger for Bandwidth Spells Opportunity," *Private Cable & Wireless Cable*, at 16-17 (August, 1998).

[5/] Werbach, *Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series 29, at 73 (March 1997)["*Digital Tornado*"]; *see also*, Press Statement of Chairman William E. Kennard on FCC's Actions to Promote Deployment of Advanced Telecommunications Services by All Providers, 1998 FCC LEXIS 4021 (Aug. 6, 1998) ["We must expand bandwidth capacity to keep up with ever-burgeoning demand, which is now estimated to be doubling every few months."].

[6/] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, at ¶ 19 (rel. Aug. 7, 1998) ["The incumbent LECs possess wire facilities that go the last mile to nearly every home and business in the United States. The last part of these last miles generally consists of copper that, as now used, lacks advanced telecommunications capability."]; Remarks by Chairman William E. Kennard to the National Association of Regulatory Utility Commissioners, Seattle, Washington, 1998 FCC LEXIS 3767 (July 27, 1998) ["[Demand for bandwidth] could grow faster and consumers could see even more benefits if the 'last mile' could carry even more. Last week, a reporter observed that audio programming on the Internet 'sounds

(continued...)

CoreComm fears that approval of the merger as currently proposed would provide the Joint Applicants with a unique and nearly insurmountable competitive advantage: by leveraging TCI's market power and control over essential cable facilities as the foundation for its entry into the local exchange market, AT&T will enjoy exclusive control over the last mile of broadband "pipe" into the homes of TCI's subscribers, and, consequently, will be able to establish itself as a gatekeeper that controls access to video, voice, Internet and data services offered by CoreComm and other competing providers of diversified communications services. TCI's stranglehold over critical video programming only further aggravates the problem.

The Commission has already noted that cable has little or no competition in local markets, and that encouraging competition to TCI and other cable MSOs is among the agency's highest priorities.[7/] Though in principle CoreComm does not oppose AT&T's desire to use TCI's cable facilities as a means of entering local markets, under no circumstances should AT&T be permitted to leverage TCI's market power and control over essential facilities in ways that would thwart introduction and development of competition in the market for diversified

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[6/] (...continued)
like it is coming in on two dog food cans and twine.' That's a problem of too little 'bandwidth.' It's like trying to fight fires with a garden hose instead of a fire hose. Capacity improves performance."].

[7/] *See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1038 (1998) [noting that "87% of MVPD subscribers receive service from their local franchised cable operator," that the cable industry "continues to occupy the dominant position in the MVPD marketplace," and that "[l]ocal markets for the delivery of video programming generally remain highly concentrated and are still characterized by some barriers to both entry and expansion by competing distributors"]; *id.* at 1239 (separate statement of Chairman William E. Kennard) ["Although the Communications Act mandates that we substantially loosen rate controls next year, there are actions we have taken, and some we can take in the interim, that can foster more competition."] [the "*Fourth Annual Report*"].

communications services. Both the Communications Act of 1934, as amended, and the Commission's own precedent provide the agency with ample authority to deny the license transfer applications necessary to effectuate the merger, or, in the alternative, condition any approval thereof upon the Joint Applicants' submission of additional information and the amendment of their license transfer applications to include certain explicit and enforceable commitments as to the matters raised below.

In sum, this proceeding presents the Commission with an unprecedented opportunity to ensure that the pro-competitive objectives of the Telecommunications Act of 1996 move forward towards fruition. As Chairman Kennard noted in the Commission's most recent Annual Report to Congress on the status of competition in markets for delivery of video programming:

> Maintaining regulation as a surrogate for competition, and only until such time as competition arrives, is consistent with the historical underpinnings of federal regulation of cable television and reaffirmed by the Telecommunications Act of 1996. Yet I do not believe that, come March 1999, the consumer will be able to rely on a competitive market to ensure reasonable prices and choice. Therefore, I look forward to pursuing the initiatives I have described above to give the American public as much choice and value as can be achieved in the market . . . .[8/]

Accordingly, for the reasons set forth below, CoreComm requests that the Commission follow through on the Chairman's call to action and deny the Joint Applicants' license transfer applications, or, in the alternative, (1) affirm that Liberty Media Corp. will remain subject to the Commission's program access rules notwithstanding the proposed post-merger restructuring of AT&T; (2) require the Joint Applicants to amend their applications to include full details as to the "preferred vendor" arrangements between Liberty and TCI, and to make those documents

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[8/] *Fourth Annual Report*, 13 FCC Rcd at 1241-2.

available for Commission review and public comment; (3) condition its approval of the license transfer applications on the receipt of explicit and enforceable commitments from the Joint Applicants with respect to (a) provision of nondiscriminatory access to Liberty programming, (b) provision of nondiscriminatory access to the Joint Applicants' facilities by unaffiliated Internet service providers ("ISPs"), (c) and bundling of services.

II. THE AT&T/TCI LICENSE APPLICATIONS SHOULD BE DENIED UNLESS THE JOINT APPLICANTS ARE SUBJECT TO SPECIFIC COMMISSION-IMPOSED SAFEGUARDS WITH RESPECT TO PROGRAM ACCESS.

A. Nondiscriminatory Access To Liberty Media's Programming Is Essential For Successful Introduction and Development of Meaningful Competition in the Market For Multichannel Video Services.

TCI's cable programming subsidiary, Liberty Media Corp. ("Liberty"), is one of the most powerful vertically-integrated satellite cable programming entities in the marketplace today. Liberty holds ownership interests in a wide variety of cable programming services, a number of which have substantial brand recognition and are widely regarded as critical to the success of any package of video services offered by current or prospective competitors of incumbent cable MSOs.[9/] For example, Liberty holds a substantial ownership stake in Fox SportsNet, a national cable sports network that enjoys unprecedented control of professional sports programming in local markets, including one of the markets (Ohio) where CoreComm is presently operating:

[9/] These services, for example, include such popular networks as The Discovery Channel, The Learning Channel, fX, QVC, Black Entertainment Television, E! Entertainment, and the various Encore premium movie services. *Id.*, 13 FCC Rcd at 1213-16 (1998).

> [W]ith the [Fox SportsNet] deal, [Rupert] Murdoch and [John] Malone were taking over sports broadcasting in New York, Chicago, Boston, Philadelphia, San Francisco and the state of Ohio. With this final piece, Fox SportsNet . . . would control the local TV rights to 69 of the 75 professional teams in baseball, basketball and hockey, an astonishing coup. The meaning was simple, Murdoch would own the home-team sports fan almost everywhere. If you wanted to watch teams from other parts of the country, you could turn on ESPN or the Big Three networks. If you wanted to watch teams from your own city or region, you'd probably have to tune in to Fox [SportsNet].[10/]

Moreover, the cable industry's control of local sports programming (and the corresponding potential for such programming to be withheld from alternative MVPDs) has been strengthened even further by cable MSO *ownership* of professional sports teams. As noted with respect to cable MSO Cablevision Systems Corporation, a company in which TCI now holds a one-third ownership interest:

> Cablevision [has] full ownership of the Knicks and Rangers sports teams and of the MSG cable network, as well as of the [Madison Square Garden] arena itself. Coupled with the cable rights it already has to five major New York area professional teams -- the Yankees, Mets, Devils, Nets and Islanders -- Cablevision has become the uncontested powerhouse of television sports.[11/]

In other words, Cablevision literally is vertically integrated from top to bottom: in the case of the Knicks and the Rangers, it owns the facilities where programming is created (Madison Square Garden), the program content itself (the Knicks and the Rangers), the cable programming

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[10/] Deutschman, "Sly as a Fox," *The New York Times Magazine*, pp. 69, 70 (October 18, 1998) (also noting that "[b]y televising up to nine baseball games in scattered regions on a single night, for example, Fox [SportsNet] attracts more than twice as many viewers as ESPN does for its one-size-fits-all national broadcast"); *see also* "New Teammates: Fox/Liberty Nets, SportsChannel," *Media Daily* (July 1, 1997) [quoting Fox SportsNet executive as referring to the network as "quite a behemoth."].

[11/] Fabrikant, "As Wall Street Groans, A Cable Dynasty Grows," *N.Y. Times*, Financial P. 1 (April 27, 1997).

services that transmit that program content (the MSG and SportsChannel networks) and the cable systems which will retransmit that program content to 2.5 million subscribers in the New York market after Cablevision's acquisition of TCI's cable systems.[12/]

In Section 628 of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress recognized that vertical integration is the heart of the program access problem, and thus gave the Commission a specific mandate to ensure that cable's competitors have full and fair access to vertically-integrated, cable programming.[13/] Chairman Kennard himself has acknowledged the significance of Congress's directive: "New entrants seeking to compete against incumbents must have a fair opportunity to obtain and market programming, and the Commission's program access rules must be enforced swiftly and

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[12/] Cablevision's strategy has been replicated in the Philadelphia market by Comcast Cable, which holds controlling interests in the NBA's Philadelphia 76ers and the NHL's Philadelphia Flyers, the arena in which those teams play (CoreStates Center), and the cable network which carries 76ers and Flyers games (Comcast SportsNet). *See, e.g.*, "Going Opping With The Big Guns of Cable," *Media Daily* (Dec. 5, 1997); "Fox, Comcast Sport New Services in Detroit, Philadelphia," *Media Daily* (July 29, 1997).

[13/] *See, e.g., Outdoor Life Network and Speedvision Network*, DA 98-1241, at ¶ 10 (CSB, rel. June 26, 1998) ["The program access provisions of the 1992 Cable Act were enacted to increase competition and diversity in the multichannel video programming distribution market by providing greater access to cable programming services. . . Congress found that the cable industry was significantly vertically integrated, *i.e.*, cable systems and programmers are often commonly owned, and vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors."]; 1992 Cable Act Conference Report, H.R. Rep. 102-862, 102d Cong., 2d Sess. at 93 (1992) ["In adopting rules under this section, the conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory rates to non-cable technologies. The conferees intend that the Commission shall encourage arrangements which promote the development of new technologies by providing facilities-based competition to cable and extending programming to areas not served by cable."] [the "Conference Report"].

effectively."[14/] In that same spirit, CoreComm urges that the Commission secure from the Joint Applicants the program access commitments identified below, so that Congressional intent and the Commission's pro-competitive agenda for alternative MVPDs do not become casualties of AT&T's proposed entry into local markets.

B. The Commission Should Affirm That Liberty Will Remain Subject To the Commission's Program Access Rules If and When The Merger is Consummated.

As already noted by other commenting parties, the Joint Applicants have asserted that Liberty will enjoy "operational independence" from TCI's cable systems by virtue of the fact that Liberty and TCI's cable systems will be held in separate "tracking stock" subsidiaries, *i.e.*, Liberty Media Group and AT&T Consumer Services Co., respectively.[15/] The Joint Applicants also allege that there will be a "firewall" between Liberty Media Group and AT&T Consumer Services Co., and that Liberty Media Group will be preserved "as a separately managed business group engaged in its current video programming businesses and any other business it elects to enter."[16/]

[14/] *Fourth Annual Report*, 13 FCC Rcd at 1239. More recently, however, there have been indications that the Commission's commitment to program access may no longer be as strong as cable's competitors had previously believed. For instance, in its October 28, 1998 decision denying EchoStar's price discrimination complaint against Fox SportsNet, the Cable Services Bureau went so far as to say that program access is a "*limited exception*" to the Commission's policy of "avoid[ing] unnecessarily regulatory interference regarding contracts entered into by consenting parties." *EchoStar Communications Corporation v. Fox/Liberty Networks, et al.*, DA 98-2153, at para. 20 (rel. Oct. 28, 1998) [emphasis added].

[15/] Comments of Ameritech at 36-37; Comments of DirecTV at 2-3; Echostar Comments at 8-9; WCA/ICTA Joint Comments at 4-10.

[16/] *Id.*

In truth, however, "tracking stock" does not divest a parent company of its control over a tracking stock subsidiary. Rather, tracking stock merely is a device that focuses investor attention on a specific line of business; it has no bearing whatsoever on the parent company's ownership and control of its subsidiaries, and does not create any "separation" between subsidiaries that is cognizable for purposes of the program access rules:

> Tracking stock . . . is a distinct class or series of stock issued by the parent company that provides a return reflecting the earnings of a particular division or subsidiary. . . [T]racking stock does not represent a legal ownership interest in the assets of the subsidiary. Like other parent company shareholders, tracking stockholders have claims on all the parent's assets as a whole. *From the parent company's standpoint, there is no change in managerial operating control, and there continues to be only one governing Board of Directors.*[17]

Indeed, Liberty is *already* a "tracking stock" subsidiary of TCI, but this has not stopped the Commission from declaring that Liberty-owned programming services are subject to program access obligations.[18] In any case, the record before the Commission reflects that the historically close relationship between Liberty and TCI's cable systems will be preserved notwithstanding AT&T's use of the tracking stock mechanism, and that there otherwise is nothing in

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[17] "Repackaging Corporate Assets," Salomon Smith Barney, at 29 (in-house publication, July 1998) [emphasis added]; *see also id.* [noting that the use of tracking stock "is most appropriate where a carveout or spin-off cannot be effected because legal separation from the parent might impair the financial flexibility of either the parent or the subsidiary], and at 31 [tracking stock "retains parent control and permits the continuation of synergies arising from a larger enterprise]; WCA/ICTA Joint Comments at 5.

[18] *Echostar Communications Corporation v. Fox/Liberty Networks, LLC, et al.*, 13 FCC Rcd 7394, 7397 (CSB, 1998); *see also Fourth Annual Report*, 13 FCC Rcd at 1123-4 (noting that proposed transaction to bring the Seagram cable networks under the control of HSN, Inc. would apparently result in both the USA Network and the SCI-FI Network being considered vertically integrated, by virtue of Liberty's proposed ownership interest in HSN, Inc.).

AT&T/TCI's public interest showing that would remove Liberty from the scope of the Commission's program access rules.[19/]

The Commission should not assume that AT&T/TCI's silence on the above is benign: TCI already has strongly opposed any application of the program access rules to a third party (which in this case would be AT&T) that holds separate ownership interests in a cable operator (AT&T Consumer Services Co.) and a satellite cable programming vendor (Liberty).[20/] Thus, there is a substantial chance (even a probability) that the post-merger AT&T would seek to advance this same argument in opposition to a program access complaint directed at Liberty, *if* the Commission's disposition of the AT&T/TCI license transfer applications allows it to do so. Accordingly, for this reason and others set forth by various alternative MVPDs in this proceeding, CoreComm asks that the Commission affirm that Liberty will remain subject to the Commission's program access rules if and when the proposed merger is consummated.

[19/] *See, e.g.*, WCA/ICTA Joint Comments at 6 (quoting interview with TCI Chairman Dr. John Malone, in which Dr. Malone states that the various businesses of the merged AT&T/TCI entity "are going to be all intertwined with each other" and "interrelated through [a] common board of directors and [a] common balance sheet.").

[20/] *See* Reply Comments of Tele-Communications, Inc., CS Docket No. 98-82, at 17-19 (filed Sept. 3, 1998).

C. *The Joint Applicants Should Be Required To Commit That Any Liberty Programming Migrated From Satellite to Terrestrial Delivery Will Continue To Be Available To Alternative MVPDs On Nondiscriminatory Terms and Conditions.*

As other commenting parties have observed, approval of the AT&T/TCI merger would combine AT&T's nationwide fiber-optic network with the regional cable networks of TCI and, potentially, those of other cable MSOs.[21/] The physical linkage of these networks would in turn provide Liberty with the ability and the incentive to migrate its programming from satellite delivery to terrestrial delivery, and thereafter argue that recent Commission precedent allows it to deny that programming to alternative MVPDs.[22/]

It is clear that the Commission has full authority to impose a terrestrial migration condition on the AT&T/TCI merger even in the absence of clear statutory language or Commission rules to that effect. As the Bureau has noted elsewhere:

> [E]ffective review at the initial stage of the transaction (*i.e.*, the license transfer) provides a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints. In addition, early identification of potential anticompetitive harm will also serve to mitigate the proliferation of complaints under the Commission's rules. Finally, *there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules.*[23/]

[21/] *See, e.g.*, WCA/ICTA Joint Comments at 14-17.

[22/] *See DirecTV, Inc. v. Comcast Corporation, et al.*, DA 98-2151 (CSB, rel. Oct. 27, 1998) [denying program access complaint with respect to certain Comcast SportsNet programming formerly delivered via satellite; Bureau noted that the "migrated" programming did not constitute a majority of Comcast SportsNet's programming, and that Comcast had demonstrated cost savings associated with terrestrial delivery].

[23/] *Tele-Communications, Inc. and Liberty Media Corporation*, 9 FCC Rcd 4783, 4786-7 (CSB, (continued...)

In other words, as noted in the Joint Comments of WCA and ICTA, the Commission is not required to defer action on this problem until competition to cable is crippled by widescale terrestrial migration of programming in accordance with the *DirecTV* decision.[24/] CoreComm therefore fully supports the request by WCA and ICTA that the Commission condition any approval of the AT&T/TCI merger on an explicit and enforceable commitment from both entities that any current or future Liberty programming migrated from satellite to terrestrial delivery will continue to be available to alternative MVPDs on nondiscriminatory terms and conditions.[25/]

D. The Joint Applicants Should Be Required To Provide the Commission With Full Details of the Nature, Terms and Conditions of Liberty's "Preferred Vendor" Arrangements With TCI's Cable Systems, And Make Those Agreements Available For Commission Review and Public Comment.

As noted above, the program access provisions of the 1992 Cable Act arose from Congress's determination that "cable systems and programmers are often commonly owned, and vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors."[26/] In recognition of the fact that such favoritism often takes the form of price discrimination against alternative MVPDs, Congress specifically prohibited vertically-integrated programmers from engaging in

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[23/] (...continued)
1994) [emphasis added] ["*TCI-Liberty*"].

[24/] WCA/ICTA Joint Comments at 18.

[25/] *Id.* at 18-19.

[26/] *Outdoor Life Network and Speedvision Network*, DA 98-1241, at ¶ 10 (CSB, rel. June 26, 1998).

discriminatory pricing practices.[27] Absent rigorous Commission oversight, price discrimination establishes a barrier to entry and inhibits the development of *bona fide* competition in the MVPD marketplace.

Here, there is substantial and material evidence that the AT&T/TCI merger will yield exactly the sort of behavior that motivated Congress to adopt price discrimination provisions of the program access law. Specifically, TCI's public filings with the Securities and Exchange Commission reflect that "certain agreements to be entered into at the time of the Merger as contemplated by the Merger Agreement will, *among other things*, provide preferred vendor status to [Liberty] for digital basic distribution on AT&T's systems of new programming services created by [Liberty] and its affiliates . . . ."[28] The Liberty/TCI preferred vendor agreements recently were described in *Business Week* as follows:

> Malone may leave the programming to others, but he has made sure there's a home for all of his favorites. A key concession that he extracted from AT&T will give Liberty channels "preferred vendor" status" on the existing TCI cable systems. That, claims John Tinker, an analyst at NationsBanc Montgomery Securities, Inc., means "TCI's systems give him all but free channel space for as many as 12 channels in a third of the country."[29]

In other words, what is before the Commission here is far more than the proverbial "smoking gun": Liberty apparently has entered into unique and extremely favorable carriage arrangements that provide it with guaranteed access to valuable "shelf space" on TCI's cable

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[27] 47 U.S.C. § 548(c)(2)(B).

[28] TCI Communications, Inc., Form 10-Q for quarter ended June 30, 1998, at 10 (filed Aug. 14, 1998) [emphasis added].

[29] Grover, "Malone: TV's New Uncrowned King," *Business Week*, at 118 (Oct. 5, 1998).

systems, "*among other things.*" The potential anticompetitive consequences of those arrangements become even more apparent when viewed in the context of the historically close relationship between TCI's programming and cable operations; the enormous economic benefits that the arrangements confer on Liberty; the concomitant economic benefits that will flow to the merged AT&T/TCI entity; the disturbing vagueness of the "among other things" language in TCI's SEC filings; and credible press reports as to all of the above. Simply stated, there is every indication that Liberty's "preferred vendor" arrangements include uniquely favorable pricing structures and other preferential terms and conditions that will not be made available to the Joint Applicants' competitors.

CoreComm thus submits that the Commission's public interest review of the AT&T/TCI merger should include a thorough inquiry into the price discrimination implications of any of the Liberty/TCI "preferred vendor" arrangements, *prior* to any approval of the AT&T/TCI license transfer applications. Such an inquiry would be well within the Commission's statutory authority and would not be unprecedented. Indeed, the inquiry would be similar to that which the Commission conducted in connection with its review of the program access implications of Fox's earlier proposal to invest in the cable-controlled Primestar DBS service.[30/] Moreover, the only other option, *i.e.*, forcing alternative MVPDs to litigate the issue via separately filed program access complaints, is neither required nor desirable. Given the Bureau's apparent difficulties in resolving price discrimination complaints on their merits, it cannot be said that a

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[30/] *See* Letter from Regina M. Keeney, Chief, International Bureau, re: FCC File No. 106-SAT-AL-97, at 3 (March 2, 1998).

post-hoc, case-by-case resolution of the price discrimination issues raised by the AT&T/TCI merger would be a productive use of the Commission's resources or those of interested parties.[31/] Conversely, review of these issues during the license transfer process would, as noted by the Bureau elsewhere, "[provide] a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand," and thus "mitigate the proliferation of complaints under the Commission's rules."[32/]

Accordingly, to facilitate the above-requested inquiry, CoreComm requests that the Commission, as a precondition to any approval of the AT&T/TCI license transfer applications, require the Joint Applicants to amend their applications to provide full details as to the nature, terms and conditions of Liberty's "preferred vendor" arrangements with TCI's cable systems (including any written or oral agreements, side letters or other related documents), and that the

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[31/] *See Turner Vision, Inc. v. Cable News Network, Inc.*, 13 FCC Rcd 12610, 12639 (CSB, 1998) ["[T]his case has presented difficult issues and based upon the record presented by the parties, conducting an exacting analysis of the information submitted has proven to be difficult. The record is multi-faceted and lends itself to a variety of different results, while also lacking sufficient detail to provide a precise result."] Other Commission statements regarding price discrimination cases similarly suggest that *ad hoc* resolution of the price discrimination issues presented here would be an extremely burdensome and costly process for the agency. For example, as the Commission observed in response to a written inquiry from Rep. W.J. (Billy) Tauzin about program access matters, "As the issues involved in price discrimination cases become more complex and sophisticated, greater amounts of discovery, time and resources are necessary to fairly resolve such matters. . . It is a fair general assumption, however, that discovery will be necessary in a higher percentage of price discrimination program access cases than in other types of program access claims." Letter from Chairman William E. Kennard to Rep. W.J. (Billy) Tauzin, Responses to Questions at 11 (Jan. 23, 1998).

[32/] *TCI-Liberty*, 9 FCC Rcd at 4786-7.

Joint Applicants be required to produce all relevant documentation of those arrangements for Commission review and future comment by the parties to this proceeding.[33/]

III ANY APPROVAL OF THE MERGER SHOULD BE CONDITIONED ON A COMMITTMENT FROM THE JOINT APPLICANTS THAT THEY WILL PROVIDE UNAFFILIATED ISPs WITH OPEN, NONDISCRIMINATORY ACCESS TO THEIR BROADBAND NETWORK.

The following remarks by Chairman Kennard are instructive on the issue of ISP access to AT&T/TCI's facilities:

> If we do not move quickly to open up the pathways that will make the potential of broadband technology a reality, then we are not doing the job entrusted to us by Congress. Our obligation, as I see it, is to create the right environment for fair competition in accordance with the law laid down by Congress, and then to stand back and let the competitors try to outdo each other to earn the right to serve the American consumer, by offering new and better and faster and cheaper services. *It should not matter to us who gets there first. The 1996 Act does not favor one competitor over the other.*[34/]

The realities of marketing Internet access service confirm the Chairman's point. Providers of diversified communications services add value to the customer experience by offering a wide array of communications products and by providing the customer with a variety of pricing options, depending upon whether the customer purchases services via integrated

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[33/] A protective order for this purpose could be modeled on the protective order the Commission issued in connection with the release and inspection of various programming documents produced pursuant to the agency's above-referenced program access inquiry in the Fox-Primestar matter. *See Applications of TSAT and Primestar, Inc. For Consent to Transfer of Control of TEMPO Satellite, Inc. and MCIT and Primestar LHC, Inc. for Consent to Assignment of Direct Broadcast Satellite Authorizations*, DA 98-695 (April 10, 1998).

[34/] Press Statement of Chairman Kennard on FCC's Actions to Promote Deployment of Advanced Telecommunications Services by All Providers, 1998 FCC LEXIS 4021 (Aug. 6, 1998) [emphasis added].

service offerings or *a la carte*. This approach enables the provider to market effectively to all categories of customers, ranging from those who prefer to purchase all video, voice and Internet services from a single provider (thus allowing the customer to receive a single bill for all services), to those who prefer the individualized, *a la carte* approach. In either case, however, the success or failure of ISP service is inextricably tied to whether the customer enjoys unimpeded access to that service.

Consequently, where an incumbent provider controls the underlying facility through which Internet access is delivered, there is potential for at least two types of anticompetitive conduct. First, the provider may impede customer access by controlling the "portal" or "screen" through which the customer must travel in order to reach its desired ISP. Second, the incumbent may require the customer to "buy through" certain of the incumbent's own services as a precondition of obtaining access to unaffiliated ISPs. The net result is that Internet access (and any other service dependent on it) is effectively removed from the competitor's line of product offerings, since the incumbent has either blocked the customer's access altogether or rendered the competitor's service totally uneconomical by virtue of buy-through requirements. This scenario forces competitors out of the ISP market altogether and reduces customer choice.

The record before the Commission reflects that the Joint Applicants' proposed treatment of unaffiliated ISPs violates threatens to create exactly the sort of anticompetitive conditions described above. More specifically, the Joint Applicants' exclusive control of TCI's broadband "pipe" into the home, their proposed control of the Internet "portal" through which TCI's subscribers must travel to obtain access to unaffiliated ISPs, combined with TCI's plans to offer

its @Home service as a "minimum buy" necessary for purchase of any other ISP's service, effectively will put the post-merger AT&T in the position of being the broadband "gatekeeper" to the Internet.[35/] Moreover, it is beyond dispute that TCI's subscribers will be reluctant to take an unaffiliated ISP's service when they are required to pay for @Home as well. Simply put, the pro-competitive objectives of the Telecommunications Act of 1996 cannot be squared with any regulatory policy that allows a single monopoly provider to control the underlying broadband facility *and* use its "first in time" advantage to impede a customer's access to competing ISPs.

Accordingly, for the reasons set forth in the comments filed by America Online, Mindspring Enterprises, GTE and others, CoreComm believes that the AT&T/TCI license transfer applications should be denied unless the Joint Applicants make an explicit, enforceable commitment to make their broadband network available to unaffiliated ISPs on a nondiscriminatory basis.[36/]

IV. THE COMMISSION SHOULD CONDITION ITS APPROVAL OF THE PROPOSED MERGER ON RECEIPT OF CERTAIN COMMITMENTS FROM THE JOINT APPLICANTS WITH RESPECT TO BUNDLING OF SERVICES.

A number of parties have expressed concern that AT&T/TCI will seek to exploit TCI's enormous market power in the market for cable services by forcing TCI's customers, either directly or through various pricing mechanisms, to purchase AT&T's telephony or high-speed

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[35/] *See, e.g.*, Comments of America Online at 8-14.

[36/] Comments of America Online at 30-37; Comments of Mindspring Enterprises at 17-20; Comments of GTE at 45-46; Comments of Ameritech at 21-23; Comments of MCI Worldcom at 14.

Internet access services as a condition precedent to receiving TCI's multichannel video service.[37] For example, as pointed out by GTE, the merged entity could either refuse to unbundle its services, or could use the monopoly revenues it receives from TCI's cable service to cross-subsidize below-market rates for AT&T's non-video services.[38]

Though some might suggest that such matters are best left to antitrust enforcement. the Commission has already rejected that position. Specifically, with respect to its review of the 1994 merger of TCI's cable operations and Liberty into a single entity, the Commission ruled that:

> The Commission's mandate to consider competitive issues as part of the public interest standard under the Communications Act is a separate and distinct obligation from the Department of Justice's responsibility to enforce the antitrust laws. Indeed, separate review by the Department of Justice and the Commission is common. As the Commission noted in *ABC Cos., Inc.* [citation omitted], "the standards governing Department of Justice review and the action of the Commission are significantly different. The Antitrust Division is charged with the enforcement of the antitrust laws . . ., while the Commission is charged with effectuating the policies of the Communications Act."[39]

Moreover, Congress has long expressed concerns over the ability of incumbent cable operators to use their market power and control over essential facilities as a means of forcing subscribers to purchase additional services. These concerns, for example, led Congress to pass

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[37] *See, e.g.*, Comments of Sprint Corporation at 21; Comments of MCI Worldcom at 13; Comments of GTE Corp. at 34-40.

[38] *See, e.g.*, Comments of GTE Corp. at 41. Congress expressed similar concerns in adopting the rate regulation provisions of the 1992 Cable Act. *See* Conference Report at 63 ("[T]he basic cable tier should not be required to bear a larger portion of the joint and common costs than what would be allocated on a per channel basis. The regulated, basic tier must not be permitted to serve as the base that allows for marginal pricing of unregulated services.").

[39] *TCI-Liberty,* 9 FCC Rcd at 4785-86.

the "tier buy-through" provisions of the 1992 Cable Act, which prohibit cable operators in noncompetitive markets from requiring a subscriber to purchase any tier other than the basic service tier as a condition of access to video programming offered on a per channel or per program basis.[40/] In a similar vein, the "navigation devices" provisions of the Telecommunications Act of 1996 are specifically designed to prevent an incumbent cable operator from using its market power to force subscribers into purchasing set-top boxes and other equipment exclusively from the incumbent.[41/] CoreComm believes that the public policy considerations supporting those statutory provisions are equally relevant here, and militate strongly in favor of conditioning any approval of the AT&T/TCI merger on a commitment from the Joint Applicants that (1) they will not require any TCI subscriber to purchase AT&T's telephony or Internet access services as a precondition for purchase of TCI's multichannel video service; and (2) that they will not use TCI's unregulated cable revenues to subsidize below-market pricing of the merged's entity's telephony or Internet access services.

[40/] 47 U.S.C. § 543(b)(8). That statutory provision also prohibits a noncompetitive cable operator from discriminating between subscribers to the basic tier and other subscribers with regard to rates charged for video programming offered on a per channel or per program basis.

[41/] *Id.* § 549; *see also* H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess., at 181 (1996); Statement of Commissioner Michael K. Powell re: Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 98-116, at 1 ["The real purpose of Section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment."].

V. THE JOINT APPLICANTS' COMPLIANCE WITH ANY COMMITMENTS MADE IN THIS PROCEEDING SHOULD BE VERIFIED VIA PERIODIC REPORTING REQUIREMENTS.

CoreComm strongly believes that any commitments made by the Joint Applicants in this proceeding will be of little value to competitive providers of diversified communications services absent an effective enforcement mechanism to ensure that those commitments are satisfied. Indeed, the sheer size of the merger, the national scope of the merged entity's proposed operations, and the unprecedented range and types of anticompetitive conduct that might ensue therefrom, militate strongly against any Commission action allowing the Joint Applicants to merely police themselves. As noted above with respect to program access, evaluation of the merger's anticompetitive effects on a piecemeal, complaint-by-complaint basis would burden the Commission's limited administrative resources and, where TCI's competitors and consumers are concerned, may simply be a case of too little too late.

CoreComm submits that the better approach lies in the imposition of annual reporting requirements on the Joint Applicants, under which they would at a minimum be required to certify that they are in full compliance with any commitments made as a precondition for obtaining approval of their license transfer applications.[42/] Affected competitors should be provided an opportunity to challenge those certifications where they can make a *prima facie* showing of noncompliance, and, where such challenges are successful, the Commission should

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[42/] *See, e.g., U S West, Inc.*, CSR-4788-X, DA 98-353, at ¶ 23 (CSB, 1998) [imposing reporting conditions to verify U S WEST's progress toward divestiture of in-region cable systems].

impose forfeitures or other sanctions (including license revocation) on the Joint Applications consistent with the severity of the conduct at issue.

Finally, given the dynamic nature of the businesses in which the Joint Applicants intend to compete, it is imperative that the Commission be supplied on a regular basis with the most current information available as to the impact of the merger in all relevant product markets.[43/] CoreComm thus recommends that the Joint Applicants be required to include such information in their periodic reports, and that interested parties be permitted to comment thereon to ensure the creation of a full and complete record on all of the competitive issues of concern to the agency.

VI. CONCLUSION.

The purported consumer benefits of the AT&T/TCI merger will be illusory if AT&T's entry into local markets is achieved at the expense of full and fair competition among broadband service providers. The record before the Commission indicates that the anticompetitive risks of the transaction are indeed substantial, and require proactive Commission regulation at this time. Accordingly, CoreComm asks that the Commission withhold approval of the associated license transfer applications unless and until the Joint Applicants explicitly make the commitments described above. CoreComm further requests that the Commission impose annual reporting requirements on the Joint Applicants to verify that all such commitments are being satisfied, and

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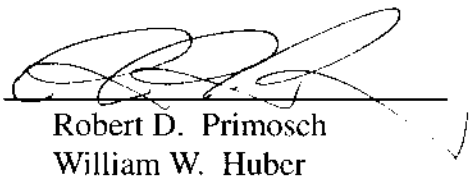
[43/] As identified in the various AT&T/TCI license transfer applications, those product markets include local exchange and exchange access services, domestic long distance services, United States international telephone services, wireless mobile telephony, multichannel video programming distribution services, video programming, and Internet services.

that the transaction otherwise is not preempting the development of a fully competitive market for broadband services.

Respectfully submitted,

CORECOMM LIMITED

By: 

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